76-496

# Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

BENSON A. WOLMAN, *et al.*,

*Appellants,*

—v.—

MARTIN W. ESSEX, *et al.*,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

## JURISDICTIONAL STATEMENT

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No. _____

BENSON A. WOLMAN, et al.,

Appellants,

-vs-

MARTIN W. ESSEX, et al.,

Appellees.

On Appeal From The United States District Court
For The Southern District of Ohio
Eastern Division

# JURISDICTIONAL STATEMENT

Appellants, Benson A. Wolman, et al., appeal from the order of the United States District Court for the Southern District of Ohio, Eastern Division (hereinafter sometimes the "District Court") entered by a three-judge district court on July 21, 1976, upholding the constitutionality of Ohio Revised Code §3317.06 and denying to appellants (plaintiffs in the court below) a permanent injunction to restrain the

enforcement of that statute which provides various programs for the benefit of sectarian private schools. 1/ Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## Opinion Below

The order and opinion of the District Court are not reported. They are set out in the Appendix, infra, pp. A1-A33.

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1/ The following are the parties to this appeal: Appellants (Plaintiffs below who are citizens and taxpayers of Ohio and the United States) are Benson A. Wolman, Frederick Chambers, Patricia J. Keenan, Barbara Kaye Besser, Nancy R. Terjesen, and Marjorie Wright. Appellees who were defendants below are Martin W. Essex, Superintendent of Public Instruction of the State of Ohio, State Board of Education, Board of Education of the City School District of Columbus, Ohio, Gertrude W. Donahey, Treasurer of the State of Ohio and Thomas E. Ferguson, Auditor of the State of Ohio, as well as the following named parents and next friends of pupils enrolled in sectarian schools: James Grit, Ewald Kane, Helen S. Koloski and Alvin Shames (substituted for Hanna Feigenbaum by order dated January 20, 1976).



## Jurisdiction

Appellants, citizens and taxpayers of Ohio and the United States, filed their complaint in the District Court on November 18, 1975 alleging that a state statute, Ohio Revised Code §3317.06, violates the First and Fourteenth Amendments of the United States Constitution by effecting an establishment of religion. The complaint demanded preliminary and permanent injunctions against the enforcement of the statute, as well as other relief.

On December 22, 1975, pursuant to 28 U.S.C. §2284, a three-judge court was convened to hear and determine the suit. 2/

The judgment sought to be reviewed was entered by the three-judge district court below on July 21, 1976, upholding the constitutionality of the state statute and denying an injunction against its enforcement. Notice of appeal to this Court was filed in the District Court on August 10, 1976.

Jurisdiction of the appeal is conferred on this Court by 28 U.S.C. §§1253 and 2281, and Flast v. Cohen, 392 U.S. 83 (1968).

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2/ The designation of the three judges was amended by further order on May 19, 1976, substituting Hon. Robert M. Duncan, District Judge for Hon. Carl B. Rubin, District Judge. The other participating judges were Hon. Joseph P. Kinneary, District Judge and Hon. John W. Peck, Circuit Judge.

## Statute Involved

The statute challenged in this litigation, Ohio Revised Code §3317.06 (also known as Senate Bill 170 and hereinafter sometimes called "SB 170" or the "Act") was signed into law on August 29, 1975. It generally replaces and expands the parochial assistance programs of former Ohio Revised Code §3317.062 which was invalidated 3/ on authority of Meek v. Pittenger, 421 U.S. 349 (1975) in the aftermath of this Court's decision of May 27, 1975 which vacated and remanded the District Court's previous judgment upholding the prior Ohio statute. See Wolman v. Essex, 421 U.S. 982, 95 S. Ct. 1985 (1975). The Act is several pages long and is appended to this jurisdictional statement (pp. A36-A40 infra.). Rather than quote it fully at this point, the relevant provisions will be summarized in the order in which they appear.

Section A provides for textbook loans to pupils or their parents.

Section B authorizes the school districts "to purchase and to loan to pupils attending

3/ By order of the District Court dated November 17, 1975, in Wolman v. Essex, No. 73-292 (S.D. Ohio E.D.). The order, entered by consent of the parties, found that the prior Ohio law was not constitutionally different from the law stricken down in Meek v. Pittenger, supra and declared it violative of the Establishment Clause.



nonpublic schools . . . or to their parents upon individual request, such secular, neutral and nonideological instructional materials as are in use in the public schools within the district and which are incapable of diversion to religious use and to hire clerical personnel to administer such lending program." As will hereinafter be discussed in further detail, it is stipulated 4/ that this section authorizes the same materials as had been authorized by the auxiliary materials provisions of the previous Ohio law which was stricken down in the wake of Meek v. Pittenger, S. 21.

Section C is identical to Section B, except that it authorizes instructional equipment instead of materials. Like Section B, the equipment available under this section is the same as the equipment which was available under the previous law to the extent it was upheld by the district court below prior to review by this Court (i.e., except to the extent it permitted materials and equipment which were regarded as susceptible of diversion to religious uses).

Section D authorizes the provision of "speech and hearing diagnostic services to pupils attending nonpublic schools . . ." Such services are to be "provided in the nonpublic school attended by the pupil receiving the service."

4/ The facts applicable to this case have been stipulated by the parties and references to pertinent paragraphs of the stipulation are cited "S" followed by the applicable paragraph number.

Section E provides for "physician, nursing, dental and optometric services" within the nonpublic schools.

Section G provides for "therapeutic psychological and speech and hearing to pupils attending nonpublic schools within the district." Unlike the diagnostic services, these services are to be "provided in the public school, in public centers, or in mobile units located off of the nonpublic premises as determined by the state Department of Education." Transportation to public schools or public centers at public expense is authorized.

Section H provides for "guidance and counseling services" to be performed in public schools, public centers or mobile units, in terms similar to those employed in Section G.

Section I provides for "remedial services" to be performed in public schools, public centers or mobile units, in terms similar to those employed in the two preceding sections.

Section J authorizes the district "to supply for use by pupils attending nonpublic schools . . such standardized tests and scoring services as are in use in the public schools of the state."

Section K authorizes "programs for the deaf, blind, emotionally disturbed, crippled, and physically handicapped children attending nonpublic schools within the district." These, like the other remedial and therapeutic programs, are to be furnished off premises in public schools, public centers or mobile units.



Section L provides for field trip transportation.

Subsequent unlettered sections flesh out administrative and fiscal detail. Most pertinently:

> "The duties of clerical personnel, hired pursuant to divisions (B) and (C) of this section, shall include distribution of loan request forms, receipt and cataloging of loan requests, inventory or instructional materials and instructional equipment to pupils or their parents, retrieval of such instructional equipment and maintaining custody and storage of these items. The instructional material and instructional equipment authorized to be loaned pursuant to divisions (B) and (C) of this section may be stored on the premises of the nonpublic school of attendance and the clerical personnel hired for administration of the lending program may perform their services upon the premises of the nonpublic school when, in the determination of the state Department of Education, it is necessary and appropriate for efficient implementation of the lending program."

The remainder of the provisions of the Act limit benefits to those which are available to pupils attending the public schools within the district; require the furnishing of benefits and the admission of students and faculty hiring to be nondiscriminatory as to race, creed, color

or national origin; prohibit the provision of services, materials or equipment for use in religious courses, devotional exercises, religious training, or any other religious activity; and provide funding limitations.

## Questions Presented

1. Does a state statute which provides for the expenditure of public funds to furnish auxiliary materials and equipment for use within sectarian schools, including materials and equipment which cannot be loaned to such schools without violating the Establishment Clause of the First Amendment, satisfy the requirement of the Establishment Clause by authorizing the lending of such materials and equipment to the pupils and parents of pupils enrolled in such schools where such statute permits the materials and equipment to be stored on the sectarian premises and serviced there by public personnel, and where the materials and equipment so loaned include items which cannot practicably be distributed to individual pupils, but will be loaned to them as a group?

2. Does a state statute which provides for the expenditure of public funds to furnish diagnostic services which include speech and hearing services and psychological services 5/

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5/ As well as physician, nursing, dental, and optometric services which are not challenged in this suit.



on the premises of private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

3. Does a state statute which provides for the expenditure of public funds to furnish therapeutic and remedial services, guidance and counseling and other programs including services and programs which cannot be publicly provided on sectarian premises without violating the Establishment Clause of the First Amendment, satisfy the requirements of the Establishment Clause by authorizing the performance of such services by public personnel at locations off the sectarian premises which include mobile units parked nearby, and undefined public centers including centers used for such purposes only for the benefit of the sectarian beneficiaries of the services?

4. Does a state statute which provides for the expenditure of public funds to furnish standardized tests and scoring services for use in private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

5. Does a state statute which provides for the expenditure of public funds to furnish field trip transportation to classes attending private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

6. Does a state statute which provides for the expenditure of public funds to lend text

books to pupils or parents of pupils attending private sectarian schools satisfy the requirements of the Establishment Clause of the First Amendment?

## Statement of the Case

### A. History.

SB 170, challenged in this action, was signed into law on August 29, 1975, before the District Court below could consider and enter its remand decision on the previous statute. The biennial appropriation for SB 170 was eighty-eight million dollars, even larger than the eighty-one million dollars appropriated for its predecessor.

Appellants filed their complaint in this action on November 18, 1975, challenging the First Amendment validity of the new law; and on plaintiffs' motion, on December 10, 1975, the District Court granted a temporary restraining order against implementation of the Act. This restraining order was modified by consent order on February 13, 1976, to permit text books to be purchased from public funds and loaned to pupils of nonpublic schools or their parents to the extent such text book loans were permitted by this Court's decision in Meek v. Pittenger, 421 U.S. 349 (1975).

The designated panel of three judges (described at p. 3 n. 2 , supra) heard the case on June 1, 1976, on the briefs and



arguments of counsel and a comprehensive factual stipulation. On July 21, 1976, the District Court announced its decision and opinion upholding the Establishment Clause validity of the Act.

### B. The Factual Record.

During the proceedings below the implementation of the Act was generally enjoined and the position of the appellants was (and continues to be) that the Act is unconstitutional on its face. Nevertheless, on March 16, 1976, the parties filed a comprehensive stipulation of facts which, together with its appended exhibits, constitutes the factual record. The stipulation contains material relevant to the manner in which Ohio's Department of Education intended to implement the Act, and relevant to the appropriateness of Supreme Court review.

All procedural matters relevant to justiciability of the issue and standing of the parties are stipulated (S-1 through S-6). The sectarian character of nonpublic education in Ohio is stipulated in terms comparable to those upon which prior adjudications of parochial aid plans in this Court have been based (S-7 through S-13).

The general mechanical operation of the statute is described in S-14 through S-16. Most significantly, the Act is implemented through the 620 local school districts of Ohio, and there is no central collation of information

as to the character of the materials and services provided. It is thus realistically impossible for a concerned citizen or litigant to discover how the funds are used, except on a sample basis.

The intended methods of implementing the various specific programs are described (S-17 through S-38). In view of their prolixity, these stipulated facts will be discussed infra in connection with the discussion of the specific programs to which they relate, rather than summarized here. It is finally stipulated that because the "new law has not been implemented . . . the stipulation can only go to the intent and policies of the Department of Education rather than to the precise manner in which that intent of policy will or will not be carried out in all instances."(S-39).

The Questions Are Substantial

I.

The decision below is in substantial conflict with the decisions of this Court in Meek v. Pittenger 6/ and Marburger v. Public Funds for Public Schools of New Jersey.7/

6/ 421 U.S. 349 (1975).

7/ 358 F. Supp. 29 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974).



Last year this Court struck down Pennsylvania's statutory program for furnishing many programs which are effectively, and often procedurally, similar to the programs offered under SB 170 challenged in this action. Meek v. Pittenger, 421 U.S. 349 (1975). In Meek this court explicated its earlier decision to like effect in Public Funds for Public Schools v. Marburger, 358 F. Supp. 29 (N.J. Dist. 1973), aff'd 417 U.S. 961 (1974). Such programs prohibited by Meek and Marburger and resurrected in Ohio's current law include programs for the furnishing of auxiliary equipment and materials for use within the parochial schools, and the furnishing of a wide variety of services by public personnel for the benefit of those attending parochial schools.

As this Statement will further elaborate at Section III, A through G, pp. 14-34, infra, Ohio's SB 170 attempts to avoid the Meek and Marburger holdings via a few simple strategems which produce slight technical differences in the wording of the law, but little meaningful change from the results already prohibited by this Court as violative of the Establishment Clause.

The principal ploy involved in the differentiation of the materials and equipment program from previous invalid programs is that the property is now ostensibly loaned to pupils and parents rather than to the schools. The principal variant in the services programs is to limit services on the parochial premises to equipment care and diagnostic services, and to remove the therapeutic and remedial services

to an allegedly neutral site. As the remainder of this Statement will urge in further detail, the materials and equipment loan to pupils is merely a sham; the limitation of services on sectarian premises to "diagnostic" services does not ameliorate the aid to religion and excessive entanglement engendered by such programs under prior unconstitutional statutes; nor does the furnishing of therapeutic services on allegedly neutral sites which on the one hand constitute the sham of curbside service to the parochial schools and, on the other hand, promise to devote such public buildings as firehouses to the special educational use of parochial constituencies, avoid the pitfalls of previous invalid auxiliary service laws.

In short, Ohio's latest effort to assist religious school amounts to an end run around the Meek and Marburger holdings of this Court in a manner which requires full review.

II.

The issue is of nationwide concern.

Programs of state aid to religious private schools quickly spread from state to state. The history of parochial assistance litigation in this Court demonstrates that each decision invalidating a particular legislative scheme has had multi-state significance. Compare, for example, Meek v. Pittenger, supra, Public Funds for Public Schools v. Marburger, supra, and Wolman v. Essex, 421 U.S. 982, 95 S. Ct. 1985 (1975) (auxiliary services and materials);



Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973); Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio E.D. 1972) aff'd 409 U.S. 808 (1972); and Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1973) aff'd sub nom Grit v. Wolman, 413 U.S. 901 (1973) (tuition reimbursement and tax credits).

The District Court approval of the new Ohio assistance plan, which achieves results prohibited by Meek and Marburger will unquestionably be adopted across the United States. In order to prevent the widespread entrenchment of these programs of questionable First Amendment consequence, Supreme Court consideration of their validity is necessary and timely.

III.

The primary effect of the Act is to benefit religion and to foster excessive governmental entanglement with religion.

A. The Instructional Materials and Equipment Loan Provisions of SB 170 Violate the Establishment Clause.

In Meek v. Pittenger, this Court struck down Pennsylvania's statutory program for furnishing instructional materials and equipment. 421 U.S. at 366. The Pennsylvania law defined instructional equipment and materials in such a way as to include substantially the same equip-

ment and materials which could be furnished under Ohio's previous law, the now superseded R.C. Sec. 3317.062. The definition of "equipment" in the Pennsylvania Act included:

> "projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological equipment . . ." 421 U.S. at 354 n. 4.

The definition of "material" included:

> ". . .books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes and video tapes, or any other printed and published materials of a similar nature. . . The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth." Ibid.

It is stipulated that (except for items allegedly incapable of religious use) the same equipment and materials will be available under SB 170 (see S-21), as was available under the previous auxiliary services and materials law. The list



set forth in the stipulation discloses that virtually all the items available under the Pennsylvania instructional equipment and material provisions invalidated in Meek are available under Sections B and C of SB 170.

The only noteworthy differences between Sections B and C of Ohio's law and the invalid provisions considered in Meek are that (i) Ohio's enactment expressly provides that only material and equipment which is "incapable of diversion to religious use" may be furnished; and (ii) the material and equipment is ostensibly "loaned" to the pupils or their parents, rather than loaned to the nonpublic school.

1. The restriction to materials and equipment incapable of diversion to religious use is insignificant and was rejected in Meek v. Pittenger.

While Ohio's SB 170 expressly contains the restriction against furnishing materials and equipment readily capable of diversion to religious use in the body of the Act, whereas Pennsylvania's law did not, the efficacy of such a restriction to save the measure from First Amendment challenge was explicitly rejected in Meek v. Pittenger. The district court in Meek, 8/ had held the furnishing of instructional materials and equipment to be

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8/ As well as the district court in the previous Ohio litigation, see Wolman v. Essex, ____F. Supp. _____ (S.D. Ohio 1974), vacated and remanded 421 U.S. 982 (1975).

constitutionally acceptable except to the extent that the statute authorized the loan of equipment "which from its nature can be diverted to religious purposes"--for example, projectors and recording equipment. 421 U. S. at 357.

Thus, in Meek, only the supplying of instructional equipment and materials ostensibly incapable of religious diversion was at issue. This Court so noted at 421 U. S. p. 357, n. 7. The statutory limitation requiring that loans be limited to materials and equipment incapable of diversion adds no element which has not been passed upon by the Supreme Court in a manner adverse to the defendants. 9/

2. The fact that the materials and equipment are to be ostensibly loaned to pupils or parents is a constitutionally insignificant sham.

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9/ The stipulation recites that "it is expected that materials and equipment loaned to pupils or parents under the new law will be similar to . . . former materials and equipment except to the extent that the law requires that materials and equipment capable of diversion to religious issues will not be supplied. Plaintiffs reserve the right to argue that the two stated differences are not significant and that the restriction against supplying materials and equipment incapable of religious diversion cannot in fact be implemented. S-21. (Emphasis added)



The District Court below found that the distinction between lending materials and equipment to parochial schools and lending them to the student body was constitutionally decisive and approved this portion of SB 170 on that basis. (Opinion, App. p. A15-17). However, in Committee for Public Education v. Nyquist, 413 U. S. 756 (1973), this Court noted that:

> "[t]here can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools . . . In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." 413 U. S. at 780.
>
> "By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools . . . The effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions." Ibid.

While SB 170 purports to limit the aid to so-called secular, neutral and nonideological materials and equipment, the teaching of Meek v. Pittenger is that the effort to limit aid to the secular portion of the school's program is illusory in view of the

"pervasive" and "inextricably intertwined" character of the religious involvement of the parochial schools. 421 U. S. at 366; and see Hunt v. McNair, 413 U.S. 734, 743 (1973). For this reason the legislative feint of lending to students and parents does not change the result decreed in Meek.

Under SB 170 there is no difference between a loan to the school and a loan to the pupils or parents. First, the materials and equipment to be loaned are not limited to items which can be meaningfully distributed to individual pupils, such as textbooks. The pupils can collectively borrow laboratories, maps and globes, posters, gymnastic equipment, sewing machines and a host of other items. See S-21 and Exh. C thereto.

Second, the statute expressly authorizes the storage of these materials and this equipment on the nonpublic school premises. While the lending is to be initiated by "individual request" it is naive to believe that what is requested will not be determined by the requirements of the nonpublic school administration and faculty.

The net result is that while the pupils or their parents may be the technical bailees of the loaned equipment and materials, the equipment and materials will be deployed in exactly the same manner as under the prior law pursuant to which they were loaned to the school. 10/

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10/ The Act further authorizes (and it is stipulated that the authority will be exercised,



The conclusion is compelled that Sections B and C of SB 170 violate the Establishment Clause. Without meaningful variation they provide the same program for the furnishing of instructional materials and equipment to sectarian institutions which is barred by Meek v. Pittenger.

B. Psychological and Speech and Hearing Diagnostic Services Provided by SB 170 Violate the Establishment Clause.

While appellants have conceded the facial constitutionality of physician, nursing, dental and optometric services provided under the Act, psychological services, and to only a lesser extent speech and hearing services, provided within the parochial schools, stand on a different footing.

Meek v. Pittenger and Marburger prohibit the furnishing of publicly funded personnel, except certain health personnel, on parochial

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see S-22) public personnel to distribute loan request forms, receive and catalog the requests, maintain inventories, distribute the material and equipment, collect the equipment, maintain custody and storage of the material and equipment and perform all other duties necessary for the efficient implementation of the program. Under the Act, these functions can be performed on the premises of the nonpublic school. These provisions alone should suffice to invalidate the program programs for excessive entanglement. See Lemon v. Kurtzman, 403 U.S. 602 (1971).

school premises.

The Pennsylvania law considered in Meek, called for "auxiliary services" to be performed by public employees on parochial school premises, including remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services. 421 U.S. at 367. The Pennsylvania public institutions, like those of Ohio, provided no surveillance to confirm that the law's secular limits were being observed, because it was felt that such surveillance was unnecessary to assure that a member of the staff had not "succumb[ed] to sectarianization of his or her professional work." 421 U.S. at 368, quoting from the district court opinion, 374 F. Supp. at 657. This Court rejected this position.

> ". . .[D]ecisions of this Court make clear that the District Court erred in relying entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." 421 U.S. at 369.

Regarding the auxiliary character of the services to be performed by these publicly subsidized teachers, this Court noted:

> "That Act 194 authorizes state-funding of teachers only for remedial and exceptional students, and not for normal students participating in the core curriculum, does not distinguish this



> case from Earley v. DiCenso and Lemon v. Kurtzman, supra. Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists. The likelihood of inadvertent fostering of religion may be less in a remedial arithmetic class than in a medieval history seminar, but a diminished probability of impermissible conduct is not sufficient: 'The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion.' 403 U.S. at 619. And a state-subsidized guidance counselor is surely as likely as a state-subsidized chemistry teacher to fail on occasion to separate religious instruction and the advancement of religious beliefs from his secular educational responsibilities." 421 U.S. at 370-371. (Emphasis added and footnote deleted.)

The foregoing portion of the Meek opinion establishes that the First Amendment strictures against public funding of services to be performed by public employees on parochial premises extend to "counselors" and other "remedial" personnel as well as to teachers. In tacit recognition of this principle, the framers of SB 170 removed the more patently remedial and therapeutic services from the parochial premises to the curbside. And, while presumably the most narrowly physical health services such as physician, nursing, dental

and optometric are protected by the Supreme Court's dictum approving such services (see 421 U.S. at 371 n. 21), no such protection should be extended to psychological and speech and hearing services.

Psychological diagnosis:

The functions of diagnostic psychological personnel include, in addition to aptitude testing, "individual measures to determine social and behavioral adaptability . . . interviewing and. . . projective procedures." S-28(b). On the face of this description, these functions include a degree of intercommunication between the diagnostician and the pupil, and an intrusion into the social and behavioral aspects of the pupil's personality, which provides at least as great an opportunity for religious influence as does the guidance counseling, testing, and remedial instruction prohibited in the parochial schools by Meek and Marburger, supra, and Levitt v. Committee for Public Education, 413 U.S. 472, 93 S. Ct. 2814 (1973).

The conclusion is compelled that it is excessively entangling for experts employed by the government to tinker with the attitudes and personality of a pupil in the setting of a religious institution. There is too great a danger, for example, that irreverent or heretical attitudes and beliefs will be interpreted as psychologically deviant or antisocial.



Speech and hearing diagnosis:

Despite this Court's dictum in Meek that a program of diagnostic speech and hearing services "seems to fall within that class of general welfare services for children that may be provided by the State. . ." 421 U.S. at 371 n. 21, there is reason to prohibit state sponsored speech and hearing services in parochial schools as well. In Meek, speech and hearing diagnostic services were stricken down because they would have been left standing alone; and notwithstanding the Pennsylvania law's severability clause, the Court ruled that the legislature "would not have passed the law solely to provide such aid." Ibid. Footnote 21 of Meek v. Pittenger remains dictum and the matter remains open for decision by this Court. In drawing the line between general welfare provisions and impermissible remedial education measures prohibited by Meek and Marburger, it would appear logical to consider the opportunity for sectarian influence and abuse. See Meek, 421 U.S. at 369. Unlike a physician or a nurse whose contact with the child is ordinarily limited to a physical appraisal and a minimal amount of verbal communication concerning the child's physical condition, the speech and hearing staff can be expected to communicate with a pupil at length in order to assess the child's communicative abilities.

It is no more sensible to lump speech and hearing diagnosticians together with doctors and nurses than with remedial reading instructors and other remedial services personnel who cannot, under Meek and Marburger, perform their services within a parochial school.

C. Therapeutic Psychological and Speech and Hearing Services, Guidance and Counseling Services, Remedial Services and Services for the Handicapped Provided by SB 170 Violate the Establishment Clause Except to the Extent Furnished Within Public Schools As Part of a General Program.

The therapeutic, counseling and remedial services encompassed by Sections G, H, I and K plainly extend far beyond the neutral health services approved by dictum in prior Supreme Court decisions. They include such specifically condemned programs as remedial reading and guidance counseling. Compare S-31 through 36 with Meek v. Pittenger, 421 U.S. at 367. 11/ Accordingly, these programs stand or fall on the constitutional effect of diverting them from within the school to a public school, or to a public center or mobile unit stationed off the nonpublic premises.

While the furnishing of governmentally subsidized services to pupils enrolled in a public school on the same basis as such services are provided for public school pupils in that school

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11/ For example, the remedial services for the handicapped are not limited to health programs. See S-36(d) and (e). These programs are to be instructional. However much one may sympathize with a handicapped child, it is no more proper to subsidize his education in a religious school than to subsidize such education for a normal child.



presents grave problems of excessive entanglement in the scheduling and integration of such services, it would appear that a statute authorizes parochial pupils to enter a public school and receive such services is not facially invalid; and accordingly, appellants do not challenge the furnishing of such services in the public schools 12/ to the extent the services are provided as part of the public school's general programs. However, the furnishing of such services in other centers or in mobile units presents different First Amendment problems. Insofar as SB 170 permits these programs at such locations it is facially invalid.

The use of mobile units results in the perpetuation of evils presented by on-premises auxiliary services.

It is stipulated that where mobile units are employed they will be stationed close to the nonpublic premises and except in unusual circumstances will be devoted exclusively to the service of the parochial pupils. (S-33). In other words, a publicly purchased mobile home can be parked in a lot next to the parochial school, or at its curbside, and public personnel will operate it as an auxiliary adjunct to the parochial school to

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12/ Appellants reserve the right to attack the application of this portion of the statute if a different program is administered for parochial pupils within a public school, or if excessive entanglement appears.

provide services which could not be performed within the walls of the school itself. The only difference between these services performed in mobile units under SB 170, and the services unconstitutionally furnished under the former Ohio law or the Pennsylvania and Michigan laws previously stricken down, is the technical question of title to the classroom.

This Court has cautioned that parochial aid schemes are not to be evaluated in "a legalistic minuet in which precise rules and forms must govern." Lemon v. Kurtzman, 403 U. S. 602, 614 (1971). Rather, "the form of the relationship" must be examined "for the light it casts on the substance." Ibid.

It is difficult to discern why a special satellite facility for parochial pupils parked outside the gate but devoted entirely to the nonpublic institution to which it is appended should provide materially less opportunity for the fostering of religion than the same unit inside the walls. One might concede that religious artifacts may be absent from the mobile unit's walls; but that is about the only discernible difference.

The furnishing of services in public centers presents problems of special benefit to a sectarian class and lack of guarantees against fostering religion or excessive entanglement.

It is stipulated that if "a program is to be offered at a public center such as a library, public meeting hall, firehouse, or recreation center, services may be available for public and nonpublic



pupils at the same center." S-33 (underscoring added). Since Ohio law does not provide for such services to be rendered for public school students at such public centers at this time, it is highly speculative that such services will in fact be rendered to public school students at public centers.

Appellants have no quarrel with making public centers available to pupils enrolled in nonpublic schools for the same purposes for which those facilities are available to the public. For example, it would be unthinkable to deny some pupils access to libraries, museums, parks, zoos and the like because they are enrolled in parochial schools. However, that is not the case when a special program is instituted in a public center for the special benefit of parochial pupils which is either not available to public school pupils at that center or is only made available to them in order to justify the assistance to the parochial constituency. In either case, the public benefit must be regarded as incidental, and the primary purpose and effect must be deemed to constitute assistance to religion. The program is a benefit to a limited sectarian class, and suspect on that basis. See Committee for Public Education v. Nyquist, 413 U. S. 756, 783 n. 38 (1973).

Moreover, the Act does not specify the character of the public centers at which the services are to be rendered; and while the stipulation names a few of such centers (S-33), the listing is not recited to be exclusive. There is nothing in the Act to preclude a substantial portion of the eighty-eight million dollars from being expended on the capital cost of erecting centers which are

public in the sense of belonging to the school district, but which are brought into being solely to effectuate the provisions of the Act for the benefit of nonpublic school pupils.

D. Standardized Testing and Scoring Services Provided by SB 170 Violate the Establishment Clause.

In Levitt v. Committee for Public Education, 413 U.S. 472, 93 S. Ct. 2814 (1973) this Court invalidated a New York statutory scheme for reimbursement of church-sponsored schools for expenses of examination and testing of pupils. The basis for the rejection of this program was not merely that it involved the payment of money to the nonpublic schools, but that testing is an "integral part of the teaching process." 413 U.S. at 481 quoting with approval from the holding of the district court, 342 F. Supp. at 444.

It is true that most of the testing involved in Levitt was teacher prepared, whereas the tests authorized by Section J of SB 170 are "standardized." However, the thrust of Meek v. Pittenger is that given the pervasive religious mission and character of the parochial schools, "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed . . ." 421 U.S. at 365.

Testing, even when standardized, remains an "integral part of the teaching process", Levitt, supra (413 U.S. at 481). As such, testing is not a



denominationally neutral health service; nor is it an item which can be distributed to each child in the parochial and public schools like a textbook. It involves personnel of the state in scoring to measure the progress of pupils in their subjects at the parochial schools (S-37). Considering the factor of pervasive religious infusion found by this Court in Meek, the fact that the subjects thus scored are nominally secular can make no difference. The predominantly sectarian teaching mission of the parochial school is a primary and direct beneficiary. The Establishment Clause is thereby violated.

E. Field Trip Transportation Authorized by SB 170 Violates the Establishment Clause.

Bus transportation to and from parochial schools, approved in Everson v. Board of Education, 330 U.S. 1 (1947) was thought to approach "the verge." Id. at 16. See Lemon v. Kurtzman, 403 U.S. 602, 624 (1971). At least the transportation approved in Everson involved getting the child to and from school at regular morning and afternoon times. That transportation did not involve assistance to any specific portion of the educational program of the parochial school; and the scheduling entanglements which it entailed, though certainly substantial, were relatively predictable and manageable. To the contrary, field trip transportation is stipulated to be for the purpose "to enrich the secular studies of students." (S-38). As such it bears a direct relation to the educational program of the school, which the state is not permitted to enhance. See Meek, supra.

Moreover, the opportunities and necessity for excessive entanglement are greatly exacerbated in the case of field trip transportation in view of potential competing scheduling demands of public and private schools.

If the busing approved in Everson "was thought to approach the 'verge'" (Lemon, 403 U. S. at 624), the field trip transportation contemplated by SB 170 must be deemed to have stepped beyond the precipice.

F. The Programs Authorized by SB 170 Foster Excessive Political Entanglement.

In passing upon the Pennsylvania services and materials law, this Court reaffirmed that the political entanglement engendered by such a law is an additional constitutionally fatal flaw.

> "The Act . . . provides successive oppportunities for political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect . . . This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary services personnel remain strictly neutral and nonideological when functioning in church-related schools compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.'" Meek v. Pittenger, 421 U. S. 349, 372 (1975).



The appropriations under Ohio's parochial aid law are much larger than those which the Supreme Court considered in Meek, Id. at 365 n. 15 and 369 n. 19. This Court has witnessed the galloping increases in such appropriations under Ohio's previous aid schemes presented to it for Establishment Clause adjudication. The biennial appropriation for parental grants at the beginning of this decade was in the vicinity of $60,000.00. See Wolman v. Essex, 342 F. Supp. 399, 403 n. 3 (1972). As the district court below remarked:

> "It requires no special wisdom to foresee that the Act, insofar as it confers benefits upon a predominately sectarian class, increases the likelihood that further debate concerning this law will be along religious lines. . . Even if couched in superficially fiscal terms, future legislative voices, both those that favor and those that oppose the Act will, by implication and construction, be debating the relative merits of religiously oriented education." Kosydar v. Wolman, 353 F. Supp. 744, 766 (1972), aff'd sub nom. Grit v. Wolman, 413 U. S. 901 (1973).

Whether or not this potential for political divisiveness would be sufficient to invalidate SB 170 absent other considerations, Cf. Committee for Public Education v. Nyquist, 413 U. S. 756, 797-798 (1973), "it is certainly a 'warning signal' not to be ignored." Ibid. This political entanglement aspect infects all but the most clearly neutral and nonsectarian portions of SB 170

and compels conclusion that of the various programs authorized by this law, only the most narrowly conceived health services should be sustained.

G. The Textbook Loan Provisions of SB 170 Violate the Establishment Clause.

Although the appellee public officers have stipulated the intention of the state Department of Education to implement the textbook provision in a manner which is similar to that upheld in Meek v. Pittenger, 421 U.S. 349, 362 (1975) and Board of Education v. Allen, 392 U.S. 236 (1968), the Ohio enactment, on its face, is broader than that approved in these previous decisions. It includes textbook "substitutes." Moreover, for the reasons well expressed in the dissenting opinion of Justice Douglas in Board of Education v. Allen, 392 U.S. at 254-266, there is important reason to overrule these previous textbook decisions. 13/ While the content of a textbook may be fixed in the sense that the print on the page will not change, the manner of presentation can make the textbook one of the most powerful tools for the infusion of sectarian influence. "The textbook goes to the very heart of education in a parochial school." Id. at 257. Accordingly, if plenary review is granted, appellants will urge this Court to overrule or limit its previous decisions approving

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13/ Also see Meek v. Pittenger, 421 U.S. 349, 373-385 (1975) (Brennan, J. dissenting).



state subsidization of textbook loans for parochial schools.

## CONCLUSION

For the foregoing reasons appellants respectfully urge the Court to note jurisdiction and grant plenary review of this appeal.

Respectfully submitted,

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October, 1976

# APPENDICES



ORDER AND OPINION BELOW

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C-2-75-792

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BENSON A. WOLMAN, et al,

Plaintiffs,

-vs.-

MARTIN W. ESSEX, et al,

Defendants.

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ORDER

For the reasons and on grounds that more fully appear in the Opinion filed simultaneously herewith, it is concluded that Section 3317.06 of the Ohio Revised Code is constitutional and that plaintiffs' complaint is without merit.

IT IS THEREFORE ORDERED THAT the complaint be and it hereby is DISMISSED.

BY ORDER OF THE COURT

John W. Peck
Judge, United States Court of Appeals for the Sixth Circuit

Joseph P. Kinneary
United States District Judge

Robert M. Duncan
United States District Judge

OPINION OF THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO,
EASTERN DIVISION

BENSON A. WOLMAN, et al,

Plaintiffs,

vs.

MARTIN W. ESSEX, et al,

Defendants.

No. C-2-75-792

(Filed July 21, 1976)

Before John W. Peck, Circuit Judge, and Joseph P. Kinneary and Robert M. Duncan, District Judges.

Kinneary, District Judge. In this action plaintiffs attack the constitutionality of Ohio Revised Code Section 3317.06, pursuant to which certain services and materials routinely made available to students attending public schools throughout the state are made available to elementary and secondary nonpublic schoolchildren as well.

This matter is before the Court on the complaint and the answers, various memoranda submitted by the parties, an extensive stipulation of facts and the exhibits of the parties.



The action was commenced under the provisions of Title 42, United States Code, Section 1983, and the Court has jurisdiction over the subject matter of this action under the provisions of Title 28, United States Code, Section 1343.

On July 1, 1975 this Court upheld the constitutionality of Ohio Revised Code Section 3317.062, the predecessor statute to that under consideration in this action, to the extent that the former statute provided only secular, neutral and nonideological services and materials to students attending nonpublic schools. While appeal of this Court's decision was pending, the United States Supreme Court rendered its decision in Meek v. Pittenger, 421 U.S. 349 (1975), and held that a Pennsylvania statute similar to the former Ohio statute was unconstitutional.

The Supreme Court vacated the judgment of this Court and remanded the case for further consideration in light of its decision in Meek. The Ohio General Assembly thereafter repealed the former statute and enacted the provisions now codified in §3317.06 O.R.C. On November 17, 1975, this Court entered a consent order declaring the former statute to be violative of the First and Fourteenth Amendments.

In this action, this Court is once again called upon to review the constitutionality of Ohio's legislative attempts to provide auxiliary services and educational materials to the nonpublic schoolchildren throughout the state.

A three judge court was convened pursuant to Title 28, United States Code, Sections

2281 and 2284. On December 10, 1975, a temporary restraining order was issued prohibiting the defendants from implementing any provision of the statute. With the consent of the parties, that order was subsequently modified to permit the expenditure of monies necessary to purchase textbooks and textbook substitutes and to lend such items to nonpublic school pupils or to their parents pursuant to the statute.

I.

Plaintiffs in this action are citizens and taxpayers of the United States and of the State of Ohio, and this Court concludes that these individual plaintiffs have standing to challenge the statute. Flast v. Cohen, 392 U.S. 83 (1968). The defendants are various state and local officials charged with the implementation of the statute, and parents of children attending various nonpublic schools and who are potential recipients of the materials and services authorized by the statute.

Section 3317.06 O.R.C. was enacted as a portion of an omnibus education bill, and most of its sections relate to public school assistance. Briefly, the statute authorizes expenditure of monies by local school districts to purchase and supply to elementary and secondary schoolchildren attending nonpublic schools within the districts or to their parents the following independant and fully severable materials and services: secular textbooks, or textbook substitutes, approved for use in the public schools, §3317.06(A) O.R.C.; secular and nonideological instructional materials and equipment as are in use in the public schools and which are incapable of diversion to



religious use, and to hire clerical personnel to administer the lending program, §3317.06(B), (C) O.R.C.; speech and hearing diagnostic services, physician, nursing, dental and optometric services, and diagnostic psychological services, to be provided in the nonpublic schools, §3317.06 (D), (E), (F) O.R.C.; therapeutic psychological and speech and hearing services, guidance and counseling services, remedial services, and programs for the deaf, blind, emotionally disturbed, crippled and physically handicapped children, to be provided in the public school, in public centers or in mobile units located off the nonpublic school premises, and transportation as needed, §3317.06 (G), (H), (I), (K) O.R.C.; standardized tests and scoring services such as are in use in the public schools of the state, §3317.06(J) O.R.C.; field trip transportation and services as are provided to public school students, §3317.06(L) O.R.C.

Under the statute, funds appropriated by the legislature are allocated by the Ohio Department of Education to the various local public school districts twice per year, based upon the estimated annual average daily membership in nonpublic elementary and high schools located within the district. Each local school district will then utilize the money either to purchase approved secular textbooks, instructional materials and equipment, standardized testing and scoring services and field trip transportation or to provide the diagnostic, remedial and therapeutic services authorized by the statute.

Textbooks, instructional materials and equipment, and standardized tests and scoring

services are to be purchased directly from the supplier by the local public school district. Auxiliary health and special educational service personnel will be hired and paid by the local public school districts. Such personnel, furthermore, are to be controlled and supervised by the local public school districts.

Provision of the services or materials authorized by the statute is initiated by an application submitted to the local public school district from nonpublic school representatives. This application receives administrative approval or disapproval by the local public school district after consultation with a field service coordinator from the Ohio Department of Education, and formal approval from the local public school board of education.

The statute makes clear that the materials and services available under the statute are limited to those available to pupils attending the public schools within the district and, further, that the materials and services are to be made available to pupils attending only those nonpublic schools whose admission policies make no distinction as to race, creed, color or national origin of either its pupils or of its teachers.

II

According to the stipulations of the parties, approximately 96 percent of Ohio's nonpublic schools are denominational, and during the 1974-1975 academic year, Ohio's nonpublic schools educated over 250,000 students. The parties have furnished to the Court information regarding the operations of the



Columbus Catholic elementary and secondary schools, stipulated to be fairly representative of the Catholic schools throughout the State of Ohio, which constitute approximately 86 percent of Ohio's nonpublic schools. These schools operate under the general supervision of the diocesan Bishop. While most (but not all) of the principals of such schools are religious personnel, more than two-thirds of the teachers in such schools are not. Further, most religious teachers no longer wear distinctive religious habits. Finally, the facilities of these schools often display a Christian symbol as well as the American flag.

All such schools teach the secular subjects required to meet the state minimum standards, and the parties have stipulated that, during the required secular courses, the pupils attending nonpublic schools are taught a course content generally equivalent to that taught in public schools. The state mandated five-hour school day is expanded to such schools to accommodate religious instruction and devotion for Catholic students. Discussion of topics upon which the Catholic Church has articulated a position are programmed to take place only in religion classes.

Teachers in such schools, a majority of whom are members of the Catholic faith, are employees of the schools in which they teach. However, no teacher in any such school is required to teach religious doctrine as a part of or to integrate religious doctrine into the required secular courses taught in the school.

Finally, it is to be noted that the statute challenged in this action extends the benefits provided thereunder only to those pupils attending nonpublic schools whose admission policies and hiring practices with respect to teachers make no distinction as to race, creed, color or national origin.

Although the stipulations of the parties evidence several significant points of distinction, the character of these schools is substantially comparable to that of the schools involved in Lemon v. Kurtzman, 403 U.S. 602, 615-18 (1971).[1]

III

The Establishment Clause prohibits "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, 397 U.S. 664, 668 (1970). However, the Constitution does not compel an absolute separation between the state and religious institutions. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 760-61 (1973). Thus some benefits extended to the public at large are constitutionally permissible, despite the result-

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[1]But compare this profile with those in Roemer v. Board of Public Works of Maryland, ___ U.S. ___, 44 U.S.L.W. 4939 (June 21, 1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).



ing indirect and incidental benefits flowing to religious institutions. Lemon v. Kurtzman, supra, 403 U.S. 602, 614. The Supreme Court has never held that all public aid to private education is prohibited:

> [W]here carefully limited ... , States may assist church-related schools in performing their secular functions, ... not only because the States have a substantial interest in the quality of education being provided by private schools, ... but more importantly because assistance properly confined to the secular functions of sectarian schools does not substantially promote the readily identifiable religious mission of those schools and it does not interfere with the free exercise rights of others.

Norwood v. Harrison, 413 U.S. 455, 468 (1973).

In Lemon v. Kurtzman, supra, 403 U.S. 602, the Supreme Court established a tripartite Establishment Clause test by which state action in this area is to be judged.

> ... First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, Board of Education v. Allen, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion."

403 U.S. at 612. This test, clear in its articulation if difficult in its application, is stated in terms of degree.

> It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objective of the Establishment Clause have been impaired.

Meek v. Pittenger, supra, 421 U.S. 349, 359 (1975).

Because the state has a legitimate interest in the care and education of its children, it cannot be denied that the legislation presently before this Court meets the first prong of the constitutional standard. See Kosydar v. Wolman, 353 F.Supp. 744, 751 (S.D. Ohio 1973), aff'd. sub nom Grit v. Wolman, 413 U.S. 901 (1974); Wolman v. Essex, 342 F.Supp. 399, 411 n. 13 (S.D. Ohio), aff'd., 409 U.S. 808 (1972).

The statute must be carefully examined, however, in an effort to determine whether the legislation has the principal or primary effect of advancing religion or results in an excessive government entanglement with religion.

IV

A. Textbooks



Section 3317.06(A) O.R.C. authorizes the lending of such secular textbooks as have been approved by the superintendent of public instruction for use in public schools to pupils attending nonpublic schools or to their parents. The statute defines "textbook" to mean "any book or book substitute which a pupil uses as a text or text substitute in a particular class or program in the school he regularly attends." The parties have stipulated that the materials provided under this portion of the statute shall be limited to "books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available to the individual use of each pupil in such class or group."

Administratively, individual requests for such materials are to be submitted by nonpublic pupils or by their parents, and those requests will then be summarized by the nonpublic school and forwarded to the appropriate public school official.

On its face, this aspect of the statute is constitutionally indistinguishable from the textbook provisions upheld in Board of Education v. Allen, 392 U.S. 236 (1968) and in Meek v. Pittenger, supra, 421 U.S. 349. This Court is therefore of the opinion that that portion of §3317.06 O.R.C. providing testbooks or textbook substitutes to nonpublic pupils or to their parents does not contravene the First or Fourteenth Amendments.

B. Instructional Material and Equipment

Section 3317.06(B) and (C) O.R.C. authorizes the local school districts to purchase and lend to nonpublic school pupils or to their parents instructional materials and equipment that are incapable of diversion to religious use, and to hire clerical personnel to administer the program. Examples of equipment supplied in the past under predecessor statutes include weather forecasting charts, lunar terrain models, fossil collections, and metric system materials. The statute further provides that the materials and equipment lent pursuant to the statute may be stored on the premises of the nonpublic school and the clerical personnel hired to administer the lending program may perform their duties upon the premises of the nonpublic school when necessary.

The duties of the clerical personnel hired to administer the lending program includes: distribution of loan request forms and receipt of requests, maintenance of inventory, collection and distribution of materials and equipment, maintenance of custody and storage and other duties necessary for the efficient implementation of the program.

The parties have stipulated that most public school districts will simultaneously purchase all the equipment and materials necessary for all the students in the district, both public and nonpublic, from common suppliers and, where appropriate, will employ a bidding procedure in the purchases.



The United States Supreme Court in Meek v. Pittenger, supra, 421 U.S. 349, was presented with a Pennsylvania program authorizing the lending to the nonpublic schools of that state instructional materials and equipment. The Supreme Court recognized that the materials and equipment to be provided under the statute challenged in that action could not be diverted to religious use and thus would not involve the state in an entangling policing relationship with the nonpublic schools. Meek, supra, 421 U.S. at 365. Nevertheless, the Supreme Court found the program to be violative of the Establishment Clause, and the Court's sole apparent objection to the Pennsylvania instructional materials and equipment program was to the form of the program.

> Although textbooks are lent only to students, Act 195 authorizes the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools in the Commonwealth.

Meek, supra, 421 U.S. at 362-63.[2] See also

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[2]The Supreme Court in Meek, supra, 421 U.S. at 361 n. 10 did note that, prior to the commencement of the New York and Pennsylvania textbook programs upheld in Meek and in Allen, the parents of nonpublic school-children purchased thier own textbooks. The evidence presently before this Court does not indicate whether or not parents of Ohio's nonpublic schoolchildren purchased the textbooks for their children prior to the initiation of either the textbook

Roemer v. Board of Public Works of Maryland, ___ U.S. ___, 44 U.S.L.W. 4939, 4944 (June 21, 1976). The Ohio statute authorizes, in an attempt to meet the constitutional objections articulated in Meek, the lending of such materials and equipment not to the nonpublic schools, but only to nonpublic schoolchildren or to their parents.

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or instructional materials and equipment programs, which were first instituted in Ohio nine years ago.

It remains unclear, however, whether this fact is determinative in an Establishment Clause inquiry:

> Here [federal legislation] is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld.

Tilton v. Richardson, 403 U.S. 672, 679 (1971) [emphasis supplied].



Plaintiffs argue, understandably, that an unconstitutional program conferring benefits directly upon the nonpublic school cannot be rendered constitutional merely by conferring those same benefits directly upon the pupils of that school. See Committee for Public Education and Religious Liberty v. Nyquist, supra, 413 U.S. 756, 781. Indeed, the Supreme Court itself, in holding the Pennsylvania instructional materials and equipment program unconstitutional on the ground that it had the impermissible primary effect of advancing religion, cited for support Sloan v. Lemon, 413 U.S. 825 (1973), which held invalid on the same ground a parent tuition reimbursement plan. Meek, supra, 421 U.S. at 364. Of course, both Nyquist and Sloan may be distinguished from the present case in that the monetary aid at issue in those cases was, absent excessive governmental entanglement with religion, incapable of restriction to purely secular usage.

In portions of its opinion in Meek, the Supreme Court seems to indicate that all aid flowing to the core educational functions of the nonpublic school is impermissible.[3] None-

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3 It is, of course, true that as a part of general legislation made available to all students, a State may include church-related schools in programs providing bus transportation, school lunches, and public health facilities -- secular and non-ideological services unrelated to the primary, religion-oriented educational function of the sectarian school. The

theless, the Supreme Court in Meek reaffirms state aid in the form of textbooks -- undeniably an integral part of any nonpublic school's core educational functions. Further, this Court is unable to determine a substantive difference between textbooks on the one hand and maps, charts, models and collections on the other, except, possibly, the relative effectiveness of the latter in attracting the attention of a particular student and in educating him.[4] In the view of this Court, however, the determination of pedagogical effectiveness is better left to educators than to the courts.

The Supreme Court has recognized that the education provided by nonpublic church-related schools is in part secular and in part sectarian, and that "some forms of aid may be channeled to the secular without providing direct aid to the sectarian." Committee for Public Education and Religious Liberty v. Nyquist, supra, 413 U.S. at 775. The educational materials and equipment provided by

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> indirect and incidental benefits to church-related schools from those programs do not offend the constitutional prohibition against establishment of religion.

Meek, supra, 421 U.S. at 364.

[4]The Court notes that, under the statute, instructional materials and equipment may be stored on the nonpublic premises. This fact, however, was not determinative in either Allen or Meek. See Meek v. Pittenger, 421 U.S. at 361 n. 9.



§3317.06 O.R.C. are, like textbooks, inherently secular and incapable of diversion to religious use. Further, the administrative involvement required by the statute of public personnel implementing the program is purely clerical and requires no more surveillance over or entanglement with the religious functions of the nonpublic school than does the involvement required of public personnel implementing the textbook programs upheld in Allen and in Meek. Since the nature of the clerical duties envisioned by the statute is not such as would render the personnel involved susceptible to religious influence, there is no danger that the state will become excessively involved in the religious character of the nonpublic institution.

In view of this Court, then, the Ohio instructional materials and equipment program differs neither in form nor in substance from the textbook programs previously found by the United States Supreme Court to be constitutional.

C. Diagnostic and Health Services

Section 3317.06(D), (E) and (F) authorizes the provision of such services as speech and hearing diagnosis, physician, nursing, dental and optometric services and psychological diagnosis, to take place in the nonpublic schools. The statute further authorizes the local public school districts to contract with the state department of public health in order to provide such services to the pupils attending the nonpublic schools. The parties

have stipulated that the purpose of these services is to determine if nonpublic pupils are deficient or in need of assistance in these areas.

Administratively, nonpublic school personnel will participate in the program only insofar as their cooperation is necessary to schedule, provide space and, in some instances, identify children in need of such diagnostic services. The personnel actually providing the diagnostic and health services, however, are employed by the public board of education, are under its control, and subject to periodic inspection by their supervisors solely for determination as to whether the service personnel are engaged in the proper performance of their diagnosis of health problems.

The Supreme Court in Meek v. Pittenger, supra, 421 U.S. 349, held that Pennsylvania's auxiliary services act, which provided on the nonpublic premises remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services, violated the Establishment Clause since excessive entanglement would be required for the state to assure that the professional staff members providing such services do not advance the religious mission of the nonpublic school. The Court did not hold, however, that such programs may never be extended to nonpublic schoolchildren.

> The appellants do not challenge, and we do not question, the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students



> in the Commonwealth, including those who attend church-related schools.

Meek v. Pittenger, supra, 421 U.S. at 368 n.17 [emphasis supplied].[5] The Court focused upon the academic functions of the remedial services provided in the Pennsylvania statute, and found that the personnel providing the auxiliary services were, for the most part, teachers. 421 U.S. at 370. Because the services in that case were to be provided on the nonpublic school premises, the Court found that the program was constitutionally indistinguishable from those found to be unconstitutional in Lemon v. Kurtzman, supra, 403 U.S. 602.

Accordingly, §3317.06 O.R.C. distinguishes diagnostic and health services that are concerned with the detection of health problems on the one hand, and treatment services that are concerned with the remedy of those problems on the other. The former are provided,

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[5]But see Meek v. Pittenger, 421 U.S. at 369 [footnote omitted]:

> We need not decide whether substantial state expenditures to enrich the curricula of church-related elementary and secondary schools, like the expenditure of state funds to support the basic educational program of those schools, necessarily result in the direct and substantial advancement of religious activity.

pursuant to the statute, on the nonpublic school premises, but the latter are not.

1. Physician, nursing, dental and optometric services. The plaintiffs in this action do not challenge this provision, and the Supreme Court has repeatedly stated that the states may constitutionally provide public health and welfare benefits to all of their young citizens, whether they attend public or nonpublic schools. Meek v. Pittenger, supra, 421 U.S. at 371 n.21; Lemon v. Kurtzman, supra, 403 U.S. at 616-17. This Court is of the opinion that the provision of these narrow health programs on the premises of the nonpublic school neither has the primary effect of advancing the religious mission of those schools nor involves the personnel providing such services in an excessively entangling relationship with those schools.

2. Speech and Hearing Diagnosis. The Supreme Court in Meek held Pennsylvania's auxiliary services act unconstitutional in its entirety, but indicated that it would have upheld the constitutionality of certain of the provisions of that act had severance been appropriate:

> [The Act's] authorization of "speech and hearing services," at least to the extent such services are diagnostic, seems to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools.

421 U.S. at 371 n.21.



In their stipulations, the parties describe the functions of the speech and hearing diagnostic staff to include identification of those children suffering speech and hearing handicaps and referral of such children to therapists for treatment. The duties of these specialists include cooperation with medical personnel in developing an appropriate program for each such handicapped child.

The plaintiffs challenge this provision on the grounds that speech and hearing dianostic services, like the remedial services found to be unconstitutional in Meek, provide no guarantee that religious doctrine will not become intertwined with secular services. Plaintiffs apparently believe that this conclusion necessarily results from the personal communication that must take place between the diagnostic speech and hearing specialist and the nonpublic school child.

While this Court agrees with plaintiffs that communication must almost inevitably take place when a child's speech and hearing abilities are tested, this Court disagrees with plaintiffs that such communication presents the dangers envisioned by them. To say that health services -- which the Supreme Court has consistently held to be within the realm of permissible state aid -- must be conducted in silence in order to meet all constitutional objections strikes this Court as beyond the reach of reason. Plaintiffs make no challenge to the provision of medical, dental, nursing or orthopedic services to pupils attending nonpublic schools, yet oral communication between

those persons providing such services and the nonpublic pupil takes place just as certainly as it takes place during the process of speech and hearing diagnosis.

This Court is therefore of the opinion that the statute is constitutional insofar as it authorizes the provision of speech and hearing diagnosis to take place on the premises of the nonpublic school.

3. Diagnostic psychological services. The functions of the diagnostic psychological staff include identification through recognized professional methods of children suffering from psychological problems, and referral of children requiring treatment to the therapeutic psychological staff for treatment off the premises of the nonpublic school. Plaintiffs challenge this program, arguing that such services give rise to at least the same objections as did the remedial programs held unconstitutional in Meek.

It is, no doubt, true that psychological diagnosis may involve an element of subjectivity not necessarily involved in speech and hearing diagnosis or in other medical services, yet this Court perceives a significant distinction between psychological diagnosis and psychological treatment. Psychological treatment would ideally involve an ongoing relationship with the particular child and would attempt to deal with the child in the context of his entire environment, including his educational environment, thus giving rise to the dangers articulated in Meek. Psychological diagnosis, on the other hand,



requires only relatively limited contact with the child, and the procedures employed during such contact are more easily governed by objective and professional testing methods directed, not toward the ultimate rehabilitation of the child, but toward isolating professionally recognized symptoms.

The Supreme Court in Meek addressed itself to the problems raised by the presence of personnel whose functions were perceived to be essentially pedagogical. The danger arising from the presence of teachers in the nonpublic environment stems from the nature of the functions performed by those teachers:

> In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.

Lemon v. Kurtzman, supra, 403 U.S. at 617. Diagnostic services differ markedly from teaching services in that the ongoing and at times unpredictable communication between the pupil and the teacher is not present in the diagnostic process directed toward the isolation of particular professionally recognized symptoms of physical or mental difficulties present in a child.

Accordingly, in the view of this Court, the primary beneficiaries of such programs are the children attending the nonpublic schools and the objections perceived by the Supreme Court in Meek as presented by the remedial programs authorized by the Pennsylvania legislation are not presented by Ohio's programs

authorizing only narrow forms of health diagnosis and services. Such programs do not present the necessity for entangling supervision of the personnel providing the services since, by virtue of the nature of such services, there exists no real likelihood that the professional staff providing such services will advance the religious mission of the schools in which they serve.

D. Therapeutic and Remedial Services

Section 3317.06(G), (H), (I) and (K) O.R.C. authorizes the provision of therapeutic psychological, speech and hearing services, guidance and counseling services, remedial services and programs for deaf, blind, emotionally disturbed, crippled and physically handicapped children attending nonpublic schools. Such services are to be provided off the nonpublic school premises and in public schools, public centers or in mobile units, as determined by the state department of education. Further, personnel providing such services would be employees of the local board of education or under contract with the state department of health. According to the stipulations of the parties, the determination of the precise location of such services would depend upon such factors as distance, transportation safety and adequacy of accommodations in public schools and centers. Finally, the statute authorizes transportation to public schools or centers when necessary.

The stipulations define "public center" to include libraries, public meeting halls,



firehouses, or recreation centers. It is further expected that when such services are provided in mobile units parked off nonpublic school premises, pupils requiring the services authorized by the statute will be treated on an individual basis or with a small group of students having similar problems.

Nonpublic school personnel will be involved in the operation of the programs only insofar as it is necessary to coordinate scheduling and, in some instances, to identify the children in need of such specialized services.

The Supreme Court in Meek characterized the nature of the duties of the professionals administering these remedial and rehabilitive services to nonpublic schoolchildren as essentially pedagogical and therefore susceptible to religious influence when conducted in the nonpublic schools. Section 3317.06 O.R.C. therefore authorizes the provision of these remedial services to nonpublic schoolchildren only off the premises of the nonpublic schools.

Plaintiffs argue that this section of the statute fails to meet the constitutional test of validity in that, although the statute requires that the services be provided off the nonpublic premises, there is no assurance that either the public centers or the mobile units will be truly disassociated from the nonpublic schools. Plaintiffs envision creation of "public centers" in name only but in reality created and conducted solely for the benefit of a parochial constituency.

As this Court views the legislative program, the statute authorizes the provision of

remedial and therapeutic services within the public schools -- presumably the same physical location of similar services provided to public schoolchildren. However, recognizing that the physical logistics of transporting and servicing nonpublic schoolchildren may, in some instances, preclude the provision of those services in the public schools, the General Assembly has, wisely, given to the state department of education the flexibility necessary in making these services available to all nonpublic schoolchildren under all circumstances. Yet the clear import of the statute on its face is that such services are to take place on sites neither physically nor educationally identified with the functions of the nonpublic school. Just as the statute provides no authorization for the construction of buildings, the statute on its face provides no authority for the creation of centers or mobile units public in name and financing but private in every other substantive respect.

Plaintiffs further argue that because it is anticipated that mobile units will serve only nonpublic schoolchildren when so assigned and because public centers could conceivably be made available to nonpublic schoolchildren for purposes different from those for which the center is made available to public schoolchildren, a direct aid to religion is the necessary result of the operation of the statute. In this argument plaintiffs are splitting a very fine hair.

In the view of this Court, a requirement that the facilities in which remedial and therapeutic services are provided to nonpublic



schoolchildren must remain -- both formally as well as substantively -- public facilities, does not require that those facilities be used at all times and under all circumstances in precisely the same manner with respect to both public and nonpublic schoolchildren. Most public school pupils are provided remedial and therapeutic services by the state in the school which they attend. Once it is recognized, which it must be, that the public schools may not under all circumstances be available to nonpublic schoolchildren for remedial and therapeutic services, it must be recognized that if nonpublic schoolchildren are to receive such services at all, those services will under some circumstances be made available to them in a manner not precisely identical to that in which public schoolchildren receive such services.[6]

The Court also notes that, according to the stipulations of the parties, it is anciicipated that personnel providing therapeutic and remedial services will, under some circumstances, be required to deal with the child's regular classroom teachers. Such an arrangement raises, at first glance, the specter of entanglement that could prove fatal to the programs. However, because the services are to be provided outside the nonpublic school, it cannot be said that the religious atmosphere

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[6]In Wheeler v. Barrera, 417 U.S. 402 (1974) the Supreme Court seemed to imply by way of dictum that states may provide to nonpublic schoolchildren services that are comparable, although not identical, to those provided to public schoolchildren.

of the nonpublic school will foster the risk of even unconscious injection of religion into the services found to be objectionable in Meek. Thus there exists no need for entangling supervision in order to ensure that the remedial and therapeutic personnel do not advance the religious mission of the schools attended by the nonpublic schoolchildren served.

Further, and perhaps more importantly, if any such remedial and therapeutic service is ever to be effective, it should ideally serve the child in the context of his total environment, including his educational environment. Thus, to say that such services are unconstitutional because the personnel providing such services must encounter the child's nonpublic school teacher is to say that nonpublic schoolchildren may never receive effective state supported remedial and therapeutic services.

The Supreme Court in Meek did not question the state's authority to provide such aid to its young citizens, but found objectionable only the mechanics of the Pennsylvania statute, whereby the services were to be provided in the nonpublic school. Ohio's statute removes those services from the nonpublic school's "atmosphere dedicated to the advancement of religious belief" and this Court concludes that Ohio's remedial and therapeutic programs meet the constitutional objections articulated in Meek. The primary beneficiaries of the programs are unquestionably the children who are in need of such services and the administration of the program is not likely to foster an excessive governmental entanglement with the nonpublic schools attended by those children.



E. Standardized Testing and Scoring Services

Section 3317.06(J) O.R.C. authorizes the local school districts throughout the State of Ohio to supply for use by nonpublic schoolchildren within the district such standardized tests and scoring services as are in use in the public schools of the state. Such tests, according to the stipulations provided by the parties, are used to measure the progress of all students in secular subjects.

The Supreme Court in Levitt v. Committee for Public Education, 413 U.S. 472 (1973), held unconstitutional a New York statute authorizing reimbursement to nonpublic schools for such state mandated services as the maintenance of a regular program of traditional internal testing. The Court, through Mr. Chief Justice Burger, perceived in the program the risk that "these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church." 413 U.S. at 480 [emphasis supplied].[7]

Unlike the testing program invalidated in Levitt, the program authorized by the Ohio

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[7]The Court in Levitt also noted that the New York statute provided direct money grants to nonpublic schools, yet provided no means of assuring that the money would not be used for sectarian, as opposed to secular, purposes. 413 U.S. at 477.

statute does not involve tests prepared by nonpublic school teachers, and therefore cannot result in the danger of inadvertant religious indoctrination. Rather, the Ohio statute authorizes the provision of only those same tests and scoring services as are provided in the public schools of the local district. The content of such tests, then, is necessarily and without further precaution restricted to the secular content of the state-required secular courses taught in the nonpublic schools. Since nonpublic school personnel are involved in neither the substantive drafting of the tests nor in the scoring of those tests, there is no possibility of inadvertant injection of religious doctrine in the administration of the tests. Likewise, because nonpublic school personnel will be involved only ministerially in the administration of the tests, the program will not foster an excessive entangling relationship between the state and the church-related school.

This Court is therefore of the opinion that the testing and scoring services authorized by the statute are constitutional.

F. Field Trip Transportation

Section 3317.06(L) O.R.C. authorizes the local public school districts to provide to nonpublic schoolchildren such field trip transportation and services as are provided to public school students within the district. The statute further authorizes the local school districts to contract with commercial transportation companies for the service if school district buses are unavailable. The stipulations of the parties indicate that, under the



statute, transportation would be provided for student visits to governmental, industrial, cultural and scientific centers designed to enrich the secular studies of nonpublic schoolchildren.

Plaintiffs argue that to the extent that field trip transportation relates to specific aspects of the parochial school's educational programs, the program cannot withstand constitutional scrutiny.

The Supreme Court in Everson v. Board of Education, 330 U.S. 1 (1947), upheld a New Jersey statute providing bus transportation to nonpublic schoolchildren, although the Court recognized that the state's provision of such services may have facilitated attendance at nonpublic schools. 330 U.S. at 17. The incidental benefit to the nonpublic schools was thought in that case not to render the program unconstitutional. This Court is unable to distinguish in a significant manner the constitutional provision to nonpublic schoolchildren of bus transportation on a daily basis from the provision of transportation on an occasional basis. Both may be seen to confer an indirect benefit upon the nonpublic school in the sense that the statute may render attendance at the nonpublic school somewhat more attractive to certain parents, but that indirect benefit upon the nonpublic school was not held to be determinative of the constitutionality of such programs in Everson.

Further, the administrative entanglement between public and nonpublic personnel

would not be significantly greater under the Ohio field trip program than under the program upheld in Everson, since only simple scheduling of the transportation services would be required. Because the statute specifically authorizes the local public schools to contract for transportation services where necessary to accomodate all scheduled field trips, this Court can perceive no danger that scheduling conflicts would pressure the public schools into subordinating their program schedules to accommodate those of the nonpublic schools.

This Court therefore concludes that the field trip transportation program authorized by §3317.06(L) O.R.C. is constitutional.

V

This Court concludes that §3317.06 O.R.C. is on its face constitutional. The principal or primary effect of the statute is to make available to all students within the State of Ohio, both public and nonpublic, certain limited and inherently secular services and materials. Likewise, this Court does not believe that the statute will foster excessive governmental entanglement, either administrative or political. The amount of aid appropriated by the Ohio General Assembly to effectuate all of the programs authorized by §3317.06 O.R.C. is substantial, averaging approximately $176.00 per nonpublic pupil per year. But because this Court can perceive no substantive constitutional objection to either the nature or the form of the programs authorized, this Court can perceive no constitutionally significant



distinction between a little bit of secular aid and a lot of secular aid. The statute authorizes no transfer of money to the nonpublic schools and the guidelines promulgated for the implementation of the program provide that funds unencumbered and unexpended for the authorized purposes at the close of the second year of the biennium are to be returned to the state treasurer. Surely, if the quality of the aid extended by the state to its citizens presents no constitutional objection, then the quantity of that aid must be likewise unobjectionable.

Finally, although the programs authorized by the statute are dependent upon periodic appropriations, it is the conclusion of this Court that the potentially divisive political effect of the programs is minimal. The statute on its face provides services and materials to students attending nonpublic schools only to the extent that those services and materials are already available to children attending public schools. Additionally, the services and materials provided to students in nonpublic schools cannot exceed in cost or quality the services provided to students attending public schools. Therefore, this statute merely extends already existing programs to all students in Ohio. Since the services and materials provided under the statute may not exceed in cost or quality those provided to public schoolchildren, any political debate would, in the view of this Court, most likely relate to the need for and the merits of providing such services and materials to pupils in general rather than to those attending nonpublic schools in particular.

## STATUTE INVOLVED

Ohio Revised Code §3317.06

[as enacted in

Amended Substitute Senate Bill 170

(SB 170)]

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**Sec. 3317.06. MONEYS PAID TO SCHOOL DISTRICTS UNDER DIVISION (P) OF SECTION 3317.024 OF THE REVISED CODE SHALL BE USED FOR THE FOLLOWING INDEPENDENT AND FULLY SEVERABLE PURPOSES:**

**(A) TO PURCHASE SUCH SECULAR TEXTBOOKS AS HAVE BEEN APPROVED BY THE SUPERINTENDENT OF PUBLIC INSTRUCTION FOR USE IN PUBLIC SCHOOLS IN THE STATE AND TO LOAN SUCH TEXTBOOKS TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT OR TO THEIR PARENTS. SUCH LOANS SHALL BE BASED**



**UPON INDIVIDUAL REQUESTS SUBMITTED BY SUCH NONPUBLIC SCHOOL PUPILS OR PARENTS. SUCH REQUESTS SHALL BE SUBMITTED TO THE LOCAL PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED. SUCH INDIVIDUAL REQUESTS FOR THE LOAN OF TEXTBOOKS SHALL, FOR ADMINISTRATIVE CONVENIENCE, BE SUBMITTED BY THE NONPUBLIC SCHOOL PUPIL OR HIS PARENT TO THE NONPUBLIC SCHOOL WHICH SHALL PREPARE AND SUBMIT COLLECTIVE SUMMARIES OF THE INDIVIDUAL REQUESTS TO THE LOCAL PUBLIC SCHOOL DISTRICT. AS USED IN THIS SECTION, "TEXTBOOK" MEANS ANY BOOK OR BOOK SUBSTITUTE WHICH A PUPIL USES AS A TEXT OR TEXT SUBSTITUTE IN A PARTICULAR CLASS OR PROGRAM IN THE SCHOOL HE REGULARLY ATTENDS.**

**(B) TO PURCHASE AND TO LOAN TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT OR TO THEIR PARENTS UPON INDIVIDUAL REQUEST, SUCH SECULAR, NEUTRAL AND NONIDEOLOGICAL INSTRUCTIONAL MATERIALS AS ARE IN USE IN THE PUBLIC SCHOOLS WITHIN THE DISTRICT AND WHICH ARE INCAPABLE OF DIVERSION TO RELIGIOUS USE AND TO HIRE CLERICAL PERSONNEL TO ADMINISTER SUCH LENDING PROGRAM.**

**(C) TO PURCHASE AND TO LOAN TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT OR TO THEIR PARENTS, UPON INDIVIDUAL REQUEST, SUCH SECULAR, NEUTRAL AND NONIDEOLOGICAL INSTRUCTIONAL EQUIPMENT AS IS IN USE IN THE PUBLIC SCHOOL WITHIN THE DISTRICT AND WHICH IS INCAPABLE OF DIVERSION TO RELIGIOUS USE AND TO HIRE CLERICAL PERSONNEL TO ADMINISTER SUCH LENDING PROGRAM.**

**(D) TO PROVIDE SPEECH AND HEARING DIAGNOSTIC SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICE SHALL BE PROVIDED IN THE NONPUBLIC SCHOOL ATTENDED BY THE PUPIL RECEIVING THE SERVICE.**

**(E) TO PROVIDE PHYSICIAN, NURSING, DENTAL, AND OPTOMETRIC SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE SCHOOL ATTENDED BY THE NONPUBLIC SCHOOL PUPIL RECEIVING THE SERVICE.**

**(F) TO PROVIDE DIAGNOSTIC PSYCHOLOGICAL SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE SCHOOL ATTENDED BY THE PUPIL RECEIVING THE SERVICE.**

**(G) TO PROVIDE THERAPEUTIC PSYCHOLOGICAL AND SPEECH AND HEARING SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT.**

SUCH SERVICES SHALL BE PROVIDED IN THE PUBLIC SCHOOL, IN PUBLIC CENTERS, OR IN MOBILE UNITS LOCATED OFF OF THE NONPUBLIC PREMISES AS DETERMINED BY THE STATE DEPARTMENT OF EDUCATION. IF SUCH SERVICES ARE PROVIDED IN THE PUBLIC SCHOOL OR IN PUBLIC CENTERS, TRANSPORTATION TO AND FROM SUCH FACILITIES SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED.

(H) TO PROVIDE GUIDANCE AND COUNSELING SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE PUBLIC SCHOOL, IN PUBLIC CENTERS, OR IN MOBILE UNITS LOCATED OFF OF THE NONPUBLIC PREMISES AS DETERMINED BY THE STATE DEPARTMENT OF EDUCATION. IF SUCH SERVICES ARE PROVIDED IN THE PUBLIC SCHOOL OR IN PUBLIC CENTERS, TRANSPORTATION TO AND FROM SUCH FACILITIES SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED.

(I) TO PROVIDE REMEDIAL SERVICES TO PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE PUBLIC SCHOOL, IN PUBLIC CENTERS, OR IN MOBILE UNITS LOCATED OFF OF THE NONPUBLIC PREMISES AS DETERMINED BY THE STATE DEPARTMENT OF EDUCATION. IF SUCH SERVICES ARE PROVIDED IN THE PUBLIC SCHOOL OR IN PUBLIC CENTERS, TRANSPORTATION TO AND FROM SUCH FACILITIES SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED.

(J) TO SUPPLY FOR USE BY PUPILS ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT SUCH STANDARDIZED TESTS AND SCORING SERVICES AS ARE IN USE IN THE PUBLIC SCHOOLS OF THE STATE.

(K) TO PROVIDE PROGRAMS FOR THE DEAF, BLIND, EMOTIONALLY DISTURBED, CRIPPLED, AND PHYSICALLY HANDICAPPED CHILDREN ATTENDING NONPUBLIC SCHOOLS WITHIN THE DISTRICT. SUCH SERVICES SHALL BE PROVIDED IN THE PUBLIC SCHOOL, IN PUBLIC CENTERS, OR IN MOBILE UNITS LOCATED OFF OF THE NONPUBLIC PREMISES AS DETERMINED BY THE STATE DEPARTMENT OF EDUCATION. IF SUCH SERVICES ARE PROVIDED IN THE PUBLIC SCHOOL OR IN PUBLIC CENTERS, TRANSPORTATION TO AND FROM SUCH FACILITIES SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT IN WHICH THE NONPUBLIC SCHOOL IS LOCATED.

(L) TO PROVIDE SUCH FIELD TRIP TRANSPORTATION



AND SERVICES TO NONPUBLIC SCHOOL STUDENTS AS ARE PROVIDED TO PUBLIC SCHOOL STUDENTS IN THE DISTRICT. SCHOOL DISTRICTS MAY CONTRACT WITH COMMERCIAL TRANSPORTATION COMPANIES FOR SUCH TRANSPORTATION SERVICE IF SCHOOL DISTRICT BUSSES ARE UNAVAILABLE.

HEALTH SERVICES PROVIDED PURSUANT TO DIVISIONS (D), (E), (F), AND (G) OF THIS SECTION MAY BE PROVIDED UNDER CONTRACT WITH THE STATE DEPARTMENT OF PUBLIC HEALTH.

TRANSPORTATION OF PUPILS PROVIDED PURSUANT TO DIVISIONS (G), (H), (I), AND (K) OF THIS SECTION SHALL BE PROVIDED BY THE PUBLIC SCHOOL DISTRICT FROM ITS GENERAL FUNDS AND NOT FROM MONEYS PAID TO IT UNDER DIVISION (P) OF SECTION 3317.024 OF THE REVISED CODE.

THE DUTIES OF CLERICAL PERSONNEL, HIRED PURSUANT TO DIVISIONS (B) AND (C) OF THIS SECTION, SHALL INCLUDE DISTRIBUTION OF LOAN REQUEST FORMS, RECEIPT AND CATALOGING OF LOAN REQUESTS, INVENTORY OF INSTRUCTIONAL MATERIALS AND INSTRUCTIONAL EQUIPMENT, DISTRIBUTION OF INSTRUCTIONAL MATERIALS AND INSTRUCTIONAL EQUIPMENT TO PUPILS OR THEIR PARENTS, RETRIEVAL OF SUCH INSTRUCTIONAL MATERIALS AND INSTRUCTIONAL EQUIPMENT, AND MAINTAINING CUSTODY AND STORAGE OF THESE ITEMS. THE INSTRUCTIONAL MATERIAL AND INSTRUCTIONAL EQUIPMENT AUTHORIZED TO BE LOANED PURSUANT TO DIVISIONS (B) AND (C) OF THIS SECTION MAY BE STORED ON THE PREMISES OF THE NONPUBLIC SCHOOL OF ATTENDANCE AND THE CLERICAL PERSONNEL HIRED FOR ADMINISTRATION OF THE LENDING PROGRAM MAY PERFORM THEIR SERVICES UPON THE PREMISES OF THE NONPUBLIC SCHOOL WHEN IN THE DETERMINATION OF THE STATE DEPARTMENT OF EDUCATION, IT IS NECESSARY AND APPROPRIATE FOR EFFICIENT IMPLEMENTATION OF THE LENDING PROGRAM.

NO SCHOOL DISTRICT SHALL PROVIDE HEALTH OR REMEDIAL SERVICES TO NONPUBLIC SCHOOL PUPILS AS AUTHORIZED BY THIS SECTION UNLESS SUCH SERVICES ARE AVAILABLE TO PUPILS ATTENDING THE PUBLIC SCHOOLS WITHIN THE DISTRICT.

HEALTH AND REMEDIAL SERVICES AND INSTRUCTIONAL MATERIALS AND EQUIPMENT PROVIDED FOR THE BENEFIT OF NONPUBLIC SCHOOL PUPILS PURSUANT TO THIS SECTION AND THE ADMISSION OF PUPILS TO SUCH NONPUBLIC SCHOOLS SHALL BE PROVIDED WITHOUT DISTINCTION AS TO RACE, CREED, COLOR, OR NATIONAL ORIGIN OF SUCH PUPILS OR OF THEIR TEACHERS. NO IN-

STRUCTIONAL MATERIALS OR INSTRUCTIONAL EQUIPMENT SHALL BE LOANED TO PUPILS IN NONPUBLIC SCHOOLS OR THEIR PARENTS UNLESS SIMILAR INSTRUCTIONAL MATERIALS OR INSTRUCTIONAL EQUIPMENT ARE AVAILABLE FOR PUPILS IN THE PUBLIC SCHOOLS OF THE SCHOOL DISTRICT.

NO SCHOOL DISTRICT SHALL PROVIDE SERVICES, MATERIALS, OR EQUIPMENT FOR USE IN RELIGIOUS COURSES, DEVOTIONAL EXERCISES, RELIGIOUS TRAINING, OR ANY OTHER RELIGIOUS ACTIVITY.

AS USED IN THIS SECTION, "PARENT" INCLUDES A PERSON STANDING IN LOCO PARENTIS TO A CHILD.

NOTWITHSTANDING SECTION 3317.01 OF THE REVISED CODE, PAYMENTS SHALL BE MADE UNDER THIS SECTION TO ANY CITY, LOCAL, OR EXEMPTED VILLAGE SCHOOL DISTRICT WITHIN WHICH IS LOCATED ONE OR MORE NONPUBLIC ELEMENTARY OR HIGH SCHOOLS.

THE ALLOCATION OF PAYMENTS FOR TEXTBOOKS, INSTRUCTIONAL MATERIALS, INSTRUCTIONAL EQUIPMENT, HEALTH SERVICES, AND REMEDIAL SERVICES TO CITY, LOCAL, AND EXEMPTED VILLAGE SCHOOL DISTRICTS SHALL BE ON THE BASIS OF THE STATE BOARD OF EDUCATION'S ESTIMATED ANNUAL AVERAGE DAILY MEMBERSHIP IN NONPUBLIC ELEMENTARY AND HIGH SCHOOLS LOCATED IN THE DISTRICT.

PAYMENTS MADE TO CITY, LOCAL, AND EXEMPTED VILLAGE SCHOOL DISTRICTS UNDER THIS SECTION SHALL BE EQUAL TO SPECIFIC APPROPRIATIONS MADE FOR THE PURPOSE.

THE STATE DEPARTMENT OF EDUCATION MAY ADOPT GUIDELINES AND PROCEDURES UNDER WHICH SUCH PROGRAMS AND SERVICES SHALL BE PROVIDED AND UNDER WHICH DISTRICTS SHALL BE REIMBURSED FOR ADMINISTRATIVE COSTS INCURRED IN PROVIDING SUCH PROGRAMS AND SERVICES.

FUNDS DISTRIBUTED PURSUANT TO THIS SECTION SHALL NOT EXCEED SPECIFIC APPROPRIATIONS MADE THEREFOR BY THE GENERAL ASSEMBLY, UNLESS EXPRESSLY APPROVED BY THE EMERGENCY BOARD OR THE CONTROLLING BOARD.

[End of §3317.06]



NOTICE OF APPEAL

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C-2-75-792

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BENSON A. WOLMAN, et al,

Plaintiffs,

-vs.-

MARTIN W. ESSEX, et al,

Defendants.

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Notice is hereby given that Benson A. Wolman, Frederick Chambers, Patricia J. Keenan, Barbara Kaye Besser, Nancy R. Terjesen and Marjorie Wright, plaintiffs herein, hereby appeal to the Supreme Court of the United States from the final judgment and order declaring Ohio Revised Code Section 3317.06 to be constitutional, refusing to enjoin said statute and dismissing the complaint, entered in this action on July 21,1976.

This appeal is taken pursuant to Title 28, United States Code Section 1253.

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